

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE CITY OF ROSEVILLE,

Plaintiff-Appellee,

vs.

Case No. 2004-0694-AR

EDWARD STROSS,

Defendant-Appellant.

OPINION AND ORDER

Defendant appeals of right the judgment of the 39th District Court.

I

Defendant has maintained an art studio in the City of Roseville since 1991. He wished to paint a large mural on the side of the studio, and applied for a zoning variance in order to create a mural considerably larger than the limit of 150 square feet. The variance was granted on July 15, 1997, but was conditioned on appellant agreeing not to 1) depict any exposed genitalia, 2) include any lettering, or 3) fail to maintain the sign. The resulting mural was based on Michelangelo's "Creation of Man." Pertinent to the present matter, the mural omits Adam, depicts Eve with one exposed breast, includes the word "Love," and is signed by the artist. In October, 2003, Roseville officials informed Defendant that the mural was in violation of the city ordinance, and requested that it be modified. Defendant refused to modify the painting, and the present litigation ensued.

Defendant was charged with violating sections of the City of Roseville sign ordinance precluding the erection of (1) "[a]ny sign or other advertising structure containing any obscene,



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indecent or immoral matter” or (2) any sign unlawfully installed, erected, or maintained. The charge for violating the section banning obscene, indecent or immoral signs was dismissed prior to trial, and Defendant remained charged solely with maintaining a sign unlawfully, contrary to §264-9(J) of the Roseville City Ordinances. The case was brought before the Hon. Marco A. Santia, Judge of the 39th District Court. In the proceedings below, the city did not suggest that the mural was obscene, but rather argued that the mural violated the terms of the 1997 variance. On January 21, 2005, Defendant was convicted by a jury and thereafter sentenced to serve 30 days in jail and pay a \$500.00 fine.

II

Constitutional issues and other questions of law are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997); and see *People v Riddle*, 476 Mich 116, 124; 649 NW2d 30 (2002). Appellate courts must review the entire record below in order to ensure that the lower court did not impermissibly curtail the appellant’s right to free expression. *In re Chmura (After Remand)*, 464 Mich 58, 70 n 5; 626 NW2d 876 (2001) (citation omitted).

III

In support of this appeal, Defendant first argues that plaintiff’s zoning ordinance is unconstitutionally vague and overbroad. Second, Defendant argues the variance which he was granted is unconstitutional as applied to the particular circumstances of his case. Specifically, defendant argues that the city’s attempt to prevent him from depicting “private parts” is subject to strict scrutiny as a content-based restriction of non-commercial speech, and avers that the conditions set forth in the variance are neither necessary nor narrowly tailored to serve a compelling government objective. Third, Defendant suggests that the jury was presented with a legally inadequate theory on which to convict Defendant and did not specify which theory it

convicted him under. Finally, Defendant argues that he is entitled to resentencing based on the trial court's supposed ex-parte investigation of this matter.

In response, Plaintiff notes that Defendant's claims concerning the constitutionality of the ordinance itself were not raised below and are, thus, not preserved on appeal. Next, Plaintiff claims that the mural constitutes commercial speech, and notes that regulations of such speech are subject to intermediate—rather than strict—scrutiny, urging that such regulation is permissive in furthering substantial government interests. Plaintiff also claims that Defendant failed to appeal from the decision of the zoning board of appeals within the 21 days provided by statute; Defendant is therefore estopped from presently challenging the validity of the variance, having reaped the benefit of the variance for approximately seven years. Plaintiff further argues that the restrictions imposed by the variance are, in substance, content-neutral, and serve as reasonable time, place and manner restrictions.

Plaintiff next avers that whether “private parts (genitalia)” were exposed in the mural was ultimately a question of fact for the jury; nevertheless, an independent foundation existed from which the jury was able to find that Defendant unlawfully maintained the sign with respect to the lettering. Therefore, Plaintiff argues that—notwithstanding any purported inadequacy in the jury's finding regarding the existence of genitalia—such finding was not legally inadequate, as issues pertaining to the sufficiency of evidence supporting one of several legal theories presented to a jury does not justify negating the jury's verdict altogether. Lastly, Plaintiff asserts that the trial court did not engage in an ex-parte investigation of this matter.

IV A

As a preliminary matter, the Court notes that the charges against Defendant for violation of the ordinance itself were dismissed below. Since neither party addressed this issue in the

proceedings before the lower court, the constitutionality of the ordinance itself is not preserved for appeal. Therefore, Defendant's argument that Roseville's ordinance is overbroad and vague will not be entertained here.

B

The Court next addresses the bases on which the trial court declined to resolve Defendant's constitutional arguments. During the hearing on Defendant's motion to dismiss, the trial court declined to address the specific constitutional ramifications of this case and determined that the dispositive issue was whether Defendant had violated the conditions imposed in the variance. *See* Transcript of Motion Hearing at 29. Specifically, the trial court found the constitutional issues presented to be inapposite since Defendant had agreed to the conditions imposed in the variance and failed to appeal the zoning board's decision.

While it is true that, in certain circumstances, an apparent agreement with (or acquiescence to) conditions imposed does not preclude one from later objecting to such conditions, an individual who *has* accepted and retained the advantages of a conditional variance is estopped from attacking the propriety of the condition, and is deemed to have waived any error with respect to the imposition of the condition. *City of Troy v Aslanian*, 170 Mich App 523, 530; 428 NW2d 703 (1988) (citation omitted). However, the underlying condition must be reasonable, valid, concern a legitimate zoning purpose, and be clearly expressed. *Id.* at 528-529.

It is well established that freedom of speech may be infringed by placing conditions upon a benefit or privilege. *Keyshian v Bd of Regents*, 385 US 589, 606; 87 S Ct 675; 17 LEd2d 629 (1967) (citation omitted). The variance at issue in this matter gave Defendant great latitude to paint whatever he wished, subject to three conditions, all of which were—if anything—reasonable and valid in light of the sign's location. The variance, while accommodating

Defendant, simultaneously served the City's interest in promoting traffic safety and aesthetics along the Gratiot corridor. *See* n 4, *infra*. Defendant, moreover, abided by the terms of his variance for close to seven years' time.¹

Consistent with these findings, the Court therefore holds Defendant waived his right of review of the zoning board determination under MCL 125.585(11). An appeal from a decision of a city's board of zoning appeals must be taken within 21 days of the certification of the zoning board's minutes. MCR 7.101(B); *Davenport v City of Grosse Pointe Farms Board of Zoning Appeals*, 210 Mich App 400, 405; 534 NW2d 143 (1995). In the case at bar, there is no question that Defendant failed to appeal the zoning board's decision to the circuit court. Defendant had full opportunity to revisit any aspect of the ZBA's decision with which he took issue via direct review; he decided to forego this opportunity, rendering his belated argument here foreclosed.

C

The Court now turns to the question of whether the conditions imposed by the City of Roseville impermissibly deprived Defendant of his First Amendment rights. The parties dispute whether the mural constitutes commercial or private speech,² and whether the conditions imposed by Plaintiff in its variance are content-based.

Content-based restrictions on *private* speech are subject to strict scrutiny, and the government actor must "show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos v Berry*, 485 US 312, 321-322; 99

¹ This, at the very least, implies satisfaction with the terms and conditions obtained upon negotiating his variance with the ZBA. To be sure, Defendant routinely modified his murals *within* the construct of the variance granted in 1997, until some time in 2002, when he deliberately elected to violate its provisions despite notice of the restrictions. While Defendant testified to being "satisfied" that his mural was in full compliance with the terms and conditions of the variance based on certain representations allegedly made to him (i.e., that he could purportedly "title" the mural without violating the variance's lettering prohibition notwithstanding the practical impossibility of achieving this feat), the Court finds this claim to be disingenuous. *See* Transcript of Mtn. To Dismiss, at 53, 69, 85.

² The issue of whether the mural constituted commercial or private speech was raised below in Defendant's motion

LEd2d 333; 108 S Ct 1157 (1988). If, on the other hand, a restriction on private speech is content-neutral, the government is free to impose reasonable time, place and manner restrictions on the speech. *Ward v Rock Against Racism*, 491 US 781, 791; 109 S Ct 2746; 105 LEd2d 661 (1989) (citation omitted).

“The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of a disagreement with the message it conveys. The government’s *purpose* is the controlling consideration.” (emphasis added) *Outdoor Systems v Clawson*, 262 Mich App 716, 722; 686 NW2d 815 (2004). Of further note:

[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some . . . messages but not others. Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’ [*citing Ward, supra*, 491 US at 791-792]

Outdoor Systems, at 722.

Alternatively, the First Amendment protects *commercial* speech only if that speech concerns lawful activity and is not misleading. *Metromedia, Inc v City of San Diego*, 453 US 490, 507; 101 S Ct 2882; 69 LEd2d 800 (1981). A restriction on otherwise protected commercial speech is valid only if it seeks to implement a substantial governmental interest, directly advances that interest, and reaches no further than necessary to accomplish the given objective. *Id.*, quoting *Central Hudson Gas & Electric Corp v Public Service Comm’n*, 447 US 557, 562-563; 100 S Ct 2343; 65 LEd2d 341 (1980).

The mural at issue is located on the wall of a building in which Defendant maintains his art studio, and by reasonable implication in this context, serves as an advertisement for Defendant’s trade. Therefore, the Court is satisfied that the mural constitutes commercial

speech. As commercial speech, the conditions imposed on Defendant need only have been directed toward the implementation of the substantial governmental interests of aesthetics and traffic safety, utilized for the purpose of advancing those interests, and reach no further than necessary to accomplish these objectives.

Plaintiff has articulated specific reasons—particularly with regards to traffic safety—which support the conditions it imposed when granting Defendant’s request for a variance. Defendant’s mural is prominently displayed at a major intersection in the City of Roseville. This location appears to have been uniquely visible.³ Given the location of the sign, the regulations impose reasonable conditions and are clearly related to the City’s substantial governmental interest in avoiding traffic hazards and their resultant adverse effects on motorists.⁴

At bottom, Defendant’s argument fails to account for the unique location and traffic patterns associated with the Utica Road and southbound Gratiot intersection. Neither does it acknowledge the immense size of the variance granted (nearly eight times the square footage otherwise permitted by §264-5(B)(2)(b))—virtually disregarding the zoning board’s particularized review of Defendant’s request, considering the totality of the circumstances in trying to accommodate him. It is, indeed, quite reasonable for the City to believe that certain depictions (i.e., lettering) on a mural of this scale could likely create a distraction for motorists and passersby. Accordingly, the Court is satisfied that the substantial governmental interests of

³ Defendant’s building has approximately 25 feet of frontage along southbound Gratiot Avenue, and 50 feet frontage on Utica Road, which runs northwest/southeast, dead-ending at Gratiot. The intersection of Utica Road and Gratiot Avenue is itself a sweeping turn with a traffic signal controlling traffic headed south on Gratiot, and traffic merging off of Utica Road in that direction, as well as traffic heading northbound off of Gratiot, curving onto Utica, northwest.

⁴ §264-2 provides:

“The purpose of this Chapter is to protect the health, safety, and welfare of the citizens of Roseville, including but not limited to defining and regulating signs in order to promote aesthetics, to avoid danger . . . and to regulate sign materials, avoid traffic hazards from sign locations and size, and avoid visual blight and provide for the reasonable and orderly use of signs.” *Id.*

traffic safety and aesthetics more than justify the conditions the zoning board placed on Defendant's commercial speech, directly advancing said interests, and reach no further than necessary to achieve them.⁵ To that end, the Court finds Plaintiff's purpose and objective to be abundantly clear (*see* n 4 *supra*). As the controlling consideration in determining substantive neutrality, the Court finds the regulations pertaining to maintenance and lettering to be completely unrelated to the content of Defendant's chosen expression, and therefore justifiably neutral, legitimizing the reasonable time, place and manner restrictions imposed.⁶

D

The Court now turns to Defendant's contention that his conviction must be reversed based on the possibility that the jury relied on a legally inadequate theory in convicting him. As previously noted, the variance at issue was conditioned on Defendant agreeing not to depict any private parts (genitalia) or lettering in his mural. A law is unconstitutionally vague when it prohibits behavior which is "not defined clearly enough to allow a person of ordinary intelligence to readily identify what is prohibited behavior and what is not." *Grayned v City of Rockford*, 408 US 104, 108; 92 S Ct 2294; 33 LEd2d 222 (1972).

Where the sufficiency of the legal theory presented to the jury is accepted, but the sufficiency of the evidence supporting that theory is at issue, a court should uphold the jury's verdict. *Turner v United States*, 396 US 398, 420; 90 S Ct 642; 24 LEd2d 610 (1970). Further, "[w]hen reviewing a sufficiency of the evidence claim in a criminal case, the court views the

⁵ Defendant's argument pertaining to selective enforcement is similarly unavailing: Indeed, "[s]electivity in enforcement is not itself a constitutional violation. Selection must be based on an unjustifiable standard such as race, religion, or other arbitrary classification in order to constitute a clear violation." *Whaler v Boles*, 368 US 448, 456; 82 SCt 501; 7LEd2d 446 (1962). No such showing has been made here.

⁶ The Court expresses no opinion on the regulation relating to "private parts (genitalia)", as it is immaterial to the resolution here in light of the general verdict returned in this matter, wherein sufficient evidence implicating Defendant's culpability in the violation of the variance's lettering prohibition exists to uphold judgment. *See* part D *infra*.

evidence in the light most favorable to the prosecution in determining whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt.” *People v Moorer*, 262 Mich App 64, 76-77; 683 NW2d 736 (2004). “It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of law; it is another to do so merely on the chance . . . that the jury convicted on the ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.” *United States v Townsend*, 924 F2d 1385, 1414 (CA7) (1991). The same is also true in cases where, as here, a guilty verdict on a single count charging the commission of an offense by two or more means is returned, and, while the legal sufficiency of one of the possible means is questioned, the other is conclusively established. *See Griffin v United States*, 502 US 46, 49-50; 112 SCt 466; 116 LEd2d 371 (1991).⁷

While Defendant asserts that the condition against depicting “private parts (genitalia)” does not afford a person of ordinary intelligence notice that the depiction of female breasts is prohibited, this argument ignores the alternative ground upon which the jury’s verdict was based: Defendant’s violation of the variance’s lettering prohibition. Here, there was sufficient evidence from which the fact finder could conclude that Defendant impermissibly included lettering on his sign, in direct contravention of the variance granted. Thus, notwithstanding any claimed error in the jury verdict pertaining to possible findings on genitalia, Defendant’s use of lettering, in direct violation of the variance, *is* conclusive, and controls here as “alternative grounds for which the evidence [i]s sufficient” in sustaining the judgment. *Townsend, supra*.

⁷ Historically, “[t]his common-law rule applied in a variety of contexts. It validated general verdicts returned on multicount indictments where some of the counts were legally defective . . . , see, e.g., *Clifton*, [v *United States*, 4 How. 242, 250; 11 LEd 957 (1846)]; *State v. Shelledy*, 8 Iowa 477, 511 (1859); *State v. Burke*, 38 Me. 574, 575-576 (1854); *Commonwealth v. Holmes*, 17 Mass. 336, 337 (1821), and general verdicts returned on multicount indictments where some of the counts were unsupported by the evidence, see, e.g., *State v. Long*, 52 N.C. 24, 26

E

With respect to Defendant's last argument concerning the trial court's alleged ex-parte investigation, Defendant maintains that the trial court improperly heard an audiotope of the city council meeting at which Defendant was heard on the subject of his variance, amounting to a deprivation of his due process protections.

According to the United States and Michigan Constitutions, no person may be deprived of life, liberty, or property without due process of law. US Const, Am V; Const 1963, art 1, § 17; *People v. Farrow*, 183 Mich App 436, 441, 455 NW2d 325 (1990). What process is due in a particular proceeding depends upon the nature of the proceeding, the risks and costs involved, and the private and governmental interests that might be affected. *In re Brock*, 442 Mich 101, 111, 499 NW2d 752 (1993). Generally, due process...requires notice of the nature of the proceedings and an opportunity to be heard. *Vicencio v. Jaime Ramirez, M.D., PC*, 211 Mich App 501, 504, 536 NW2d 280 (1995); *Cummings v. Wayne Co.*, 210 Mich App 249, 253, 533 NW2d 13 (1995). The notice must be reasonably calculated to apprise any interested parties of the pendency of the action and must afford them an opportunity to present objections. *Vicencio, supra*, at 504.

Here, Defendant was represented by counsel and afforded all attendant due process protections associated with sentencing; namely, the opportunity to be heard and present objections. *Vincencio, supra*. Defendant cites no authority upon which his claim may be furthered on the proffered foundation alone: Defendant was in no way prejudiced by the trial court as the defendant was in *Townsend*⁸ (where trial court *misread* the record, including

(1859); *State v. Bugbee*, 22 Vt. 32, 35 (1849) . . . It also applied to the analogous situation at issue here: a general jury verdict under a *single* count charging the commission of an offense by two or more means." (emphasis original)

⁸ *Townsend v Burke*, 334 US 736; 68 Sct 1252; 92 LEd 1690 (1948).

charges that were false, in determining sentence) or *Smith*⁹ (where trial judge had ex parte communication with probation officer) such that would warrant resentencing here. To the contrary, Defendant was effectively represented by counsel who ably offered the attributes of his client as a countermeasure to the prosecution's claims, which even included an unrelated member of the community making a statement on Defendant's behalf.

Moreover, no claim or allegation made at sentencing was inaccurate or otherwise misleading; indeed, defense counsel made no such objection to that effect. The statements presented by the City Attorney at sentencing were consistent with those reviewed by the trial court, demonstrating an acute awareness augmented by certain belligerence on the part of Defendant relative to his actions, and therefore, speaking for themselves. Defense counsel was apprised of these statements at sentencing, and given full opportunity to respond, which he did. Significantly, the trial court also heard the portion of the tape reflecting most favorably upon Defendant, *see* Transcript of Sentencing at 17-18; 22-26, providing context for the statements made by Defendant himself in the recording. The Court therefore finds no violation of Defendant's due process which would merit a finding of error requiring remand for resentencing.

V

Based on the foregoing, it is hereby

ORDERED the judgment of the 39th District Court is AFFIRMED. It is further

ORDERED the stay in this matter is DISSOLVED.

This Opinion and Order resolves the last pending claim and closes this case. MCR 2.602(A)(3).

⁹ *People v Smith*, 423 Mich 427; 378 NW2d 384 (1985).

SO ORDERED.

DATED: JUN 28 2006

cc: Timothy Tomlinson
Mark Kriger

Peter J. Maceroni,
Circuit Judge

PETER J. MACERONI
CIRCUIT JUDGE

JUN 28 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK

BY: *Carmella Sabaugh* Court Clerk